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The Propriety of Section 5(3) 0f Petroleum Profit Tax Act (Ppta) In Relation To the Freedom of Information Act (Foia); Officialsecrets Act (Osa); Evidence Act 2011(As Amended):

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ABSTRACT

This work may well be described as a child of necessity because it was inspired by the passing of the Freedom of Information Bill (FOIB) into Law and the amendment of the Evidence Act which subsequently raised salient issues worthy of discourse. The Freedom of Information Bill now Act was introduced following the clamour of journalists in Nigeria over their difficulties in obtaining relevant information from the public sector and the deliberate suppression of information by the Government, thereby promoting accountable governance and the consequent hardship in the attempt to make the government accountable. This work is thereby an incursion into the relevant provisions of the aforementioned enactments and also including Official Secrets Act, and Petroleum Profit Tax ACT analysing and comparing the provisions of the later with the other enactments in determining its propriety. Section 5(3) of the Petroleum Profit Tax Act made provisions which seemed or actually in contradiction with the other enactments already mentioned above and this paper has attempted a comprehensive outlook and examination on the matter.

INTRODUCTION

Following the amendment of the recent amendment of the Evidence Act and the passing of the Freedom of Information Bill into Law and the existing provisions of the Petroleum Profit Tax Act; have raised salient issues worthy of discourse. This is not to say that the amendments and enactment is a futile attempt, it of course serves its purpose. The purpose of this work is to highlight the discrepancies existing between these laws and the possible legal effect.

A comparative analysis of the relevant sections of the above Acts would be adopted to address the above issue.

ANALYSES OF THE RELEVANT PROVISIONS

section 5(3) (Petroleum Profit Tax Act, 2004) provides thus: "No person appointed under or employed in carrying out the provisions of this Act shall be required to produce in any court, any return, document or assessment to divulge or communicate to any court any matter or thing coming under his notice in the performance of his duties under this Act except as may be necessary for the purpose of carrying into effect the provisions of this Act, or in order to institute a prosecution, or in the course of

a prosecution for any offence committed in relation to tax"
Section 3(1) (a) of the said Act provides thus: "the due administration of this Act and the tax shall be under the care and management of the Board which may do all such acts as may be deemed necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in a manner to be prescribed by the minister"

The "Board" as mentioned in the foregoing provision was defined in *S.2* of the same Act to mean "the Federal Board of Internal Inland Revenue established and constituted in accordance with" Section 1(the Companies Income Tax Act, 2004)

Section 1 (1) (Companies Income Tax, 2004) provides that "there shall continue to be a Board of which the official name shall be the Federal Board of Inland Revenue (in this Act referred to as the "board") whose operational arm shall be called and known as the Federal Inland Revenue Service (in this Act referred to as "Service")" while sub (2) provides for the constitution of the board.

In Relation to the Freedom of Information Act 2011 (FOIA):

Since the provisions of the FOIA relates to public institutions it would be expedient to give the definition of public institution. Thus, Section 31(FOIA, 2011) defines "public institution to mean any legislative, executive, judicial, administrative, or advisory body of government, including boards, bureau, committees, or commissions, of the state, and any subsidiary body of those bodies including but not limited to committees and subcommittees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds". Therefore, in consideration of the above provisions of PPTA, CITA, FOIA, and parity of reasoning since Federal Board of Inland Revenue is a government agency saddled with the responsibility of administering tax and run with public fund and in addition to the express mention of 'board' in the above definition. Hence it qualifies as a public institution.

Section 1 (FOIA, 2011) establishes the right of any individual to access or request for information, whether or not contained in a written form, which is in the custody or possession of any public official, agency or institution howsoever described. Notwithstanding anything contained in any other Act. In other words the foregoing provision grants individuals the ultimate right to any information held by public institutions albeit there is an exception to it. The exceptions to the above general rules are provided in Sections 11-20 (FOIA, 2011). The section relevant to the discourse is Section 15 (1) (a) (FOIA, 2011) which provides thus:
Public institutions shall deny an application for information that contains inter alia commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential or where such disclosure may cause harm to the interest of the third party. Provided that nothing in this subsection shall be construed as preventing a person or business from consenting to disclosure.
Subsection (4) of the same Act further provides that *public institution shall disclose any information described in subsection (1) where the disclosure would be in the public interest and if the public interest in the disclosure clearly outweighs in importance any financial loss or gain to, or prejudice the competitive position of or interference with contractual or other negotiations of a third party*,

The foregoing provision operates to qualify the provisions of Section 5 (3) (Petroleum Profit Tax Act, 2004) giving circumstances where such information must be disclosed; in other words it is an extension of the limit of disclosure to only

tax matters and proceedings concerning tax offence under the said Act. The question now arises since the provisions in both the PPTA and FOIA are enactments of the National Assembly which of them will prevail in the event of conflict? By reference to the proviso in Section 1 (1) (FOIA, 2011) which states "*notwithstanding anything contained in any other Act, Law or regulation of the…"* and in the absence of any such proviso in Section 5 (3) (Petroleum Profit Tax Act, 2004), it follows that the FOIA overrides the said provision of PPTA. Furthermore, applying the principle of "repeal by implication" in the constitutional rule of interpretation which states that where a later provision or statute is inconsistent with an earlier provision of a statute, there is a legal presumption that the later has modified or amended the earlier provision or statute; this was upheld in the case of (*Abacha v. Fawehinmi, 2000)*

Therefore the gamut of the entire argument is that Section 5 (3) (Petroleum Profit Tax Act, 2004) created a rule and Section 15 (1) (a) & (4) (FOIA, 2011) made an exception to it.

In Relation to the Official Secret Act (OSA):

Section 1 (1) (Official Secrets Act, 2004) makes it an offence for a person to transit any classified matter to a person whom he is not authorised on behalf of the government; or transmits or obtains, reproduces or retains, any classified matter which he is not authorised on behalf of the government to transmit, obtain, reproduce, or retain. In as much as the argument proffered above applies *mutatis mutandis* to have an overriding effect on the provisions of OSA**.** In addition Section 28 (1) (FOIA, 2011) discountenances the above provision by stating thus,

the fact that any information in the custody of a public institution is kept by that institution under security classification or is classified document written within the meaning of the Official Secrets Act does not preclude it from being disclosed pursuant to an application for disclosure thereof under the provisions of this Act, but in every case the public institution to which the application is made shall decide whether such information is of a type referred to in Sections 11- 21 of the Act.

In other words the position of the FOIA still prevails.

In Relation to the Evidence Act 2011 (As Amended):

Section 191 (The Evidence Act, 2011) which dealt with 'official communication' provides that: "no public official shall be compelled to disclose communications made to him in evidence when he considers that the public interest would suffer by this disclosure."

Provided that the public official concerned shall, on the order of the court, disclose to the judge alone in chambers the substance of the communication in question… this shall be done in accordance with Section 36(4) (The Constitution, 1999)

In other words, the proviso in the foregoing provision qualifies the incapability of the public official to disclose information stating circumstances whereby he may be compelled to give the information as evidence. In contrasting the foregoing provision with the provisions of Section 15 (1) (a) (FOIA, 2011) it seems to be in tandem with the provisions of the first arm of Section 191 (The Evidence Act, 2011) in the sense that both precludes a public institutions or its official from disclosing the said information. (Note that public official by implication means a person representing a public institution).

But subsection (4) of section 15 (The FOIA, 2011) further makes an exception to the provisions of the former section (i.e. the 1st arm of section 191 of Evidence Act) "that is where the public interest would suffer for the disclosure" by stating inter alia … that where the disclosure will be in public interest and if the public interest in the disclosure clearly outweighs the

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interest of the public institution such disclosure shall be made".

IN CONCLUSION- both Section 15 (1) (a) & (4) (FOIA, 2011) and Section 191 (Evidence Act, 211) operate to defeat the absolute non-disclosure save for the proceedings in connection with tax matters or offence as enshrined in Section 5 (3) (Petroleum Profit Tax Act, 2004). Hence the propriety of Section 5 (3) (Petroleum Profit Tax Act, 2004) can be said to be appropriate to the extent allowed by the provisions of Section 15 (1) (a) & (4) (FOIA,2011) and Section 191 (Evidence Act, 2011).Hence the necessity harmonize the Provisions of the Petroleum Profit Tax Act with our Freedom of information Act, this will go a long way in ensuring the effective enforcement of the above provisions.

REFERENCE

[1] *Abacha v. Fawehinmi* (2000) FWLR Pt.4 533 at 600

[2] Companies Income Tax Act (2004) CAP C21 LFN.

[3] Constitution of the Federal Republic of Nigeria (1999) (as Amended).

[4] Evidence Act, (2011) (as Amended).

[5] Freedom of Information Act (2011).

[6] Official Secrets Act (2004) CAP O3 LFN.

[7] Petroleum Profit Tax Act (2004) CAP P13 LFN.